BOOK REVIEWS

CONSERVATION OF WATER BY STORAGE. By George F. Swain, LL.D. New Haven: Yale University Press. 1915. pp. xvii, 384.

This is a book which deserves to be brought to the attention of lawyers, not merely because the subject is one with which lawyers at present are having much to do, but even more because the author, unlike most laymen who have written upon such questions, has exerted himself to find out what the law is and to consider the relation of the law to matters of engineering import instead of employing the easier but less profitable method of ignoring or abusing the law. The chapters which are of particular interest to the legal profession are: Chapter 3. Water power at government dams on navigable streams; Chapter 4. Water power at private dams on navigable streams; and Chapter 5. Water power on the public domain. The appendices contain valuable information with respect to legislation upon the subject of water rights, and there is a full bibliography, extending over thirteen pages, which should be useful to lawyers and legislators as well as to engineers.

In recent years a notion has sprung up that running water is *res publica;* that it is owned by the state in exactly the same way, for example, that the state house is owned. This idea had its origin in the attempts of western states to make constitutional provision for the adoption of the appropriation system where it was feared federal patents had fastened the system of riparian rights upon considerable areas. All that these assertions of state ownership ever really achieved was to assert a state sovereignty with respect to the use of the water resources of the state, which really needed no assertion. To-day we may see three theories with respect to control of the use of water in competition. By the common-law theory the water of running streams is to be used and used only by riparian proprietors who are limited to a reasonable use of the water; that is, a use consistent with a like use by all others similarly situated. According to the appropriation doctrine, developed in the Pacific and Rocky Mountain states, the prior appropriator of the waters of a stream to a beneficial use acquires a property right to use the amount of water which he has appropriated, and at present, with the advent of the "use theory" as the prevailing idea in the water law of the western states, such right is measured in its extent and its duration by the beneficial use to which the water is put. A third system is the system of the Roman law with respect to what the Romans called "public streams," namely, the method of concession or franchise whereby the sovereign concedes to certain persons at a fixed toll or rental the privilege of using the water of running streams. The French code makes every stream which is capable of floating a boat or raft a public stream for the purposes of this rule. The Prussian water law of 1913 also gives a wide extension to this method of government concession. The doctrine of the civil law was obviously not adapted to the necessities of the pioneers of the Pacific slope when the appropriation doctrine was adopted in this country, for at that time there was no organized government at hand on the public domain to license use of streams, there had been no survey of the water resources of the country, and the idea of such license or concession was foreign to the individualistic ideas of the pioneer. But the federal government, assuming that it has complete common-law riparian rights on the public domain in all of our states where public domain exists, and taking advantage of its power to prevent encroachment upon navigation in navigable streams, has been inclined of late to adopt a policy which amounts to nothing less than an importation of the civil-law idea

into this country. Perhaps Professor Swain assumes too readily the soundness of the contention of federal administrative officers with respect to water on the public domain in states where riparian rights do not exist under the local law. See Mr. Bannister's article, "The Question of Federal Disposition of State Waters in the Priority States," 28 HARV. L. REV. 270. But he is undoubtedly in accord with eminent legal authority in conceding this claim, and it is not material to his argument which view is taken. In any event, the attempt to use local resources in undeveloped parts of the country as a means of raising general revenue, operates, as Professor Swain points out, simply to perpetuate a system of waste and is like nothing so much as the insistence of Great Britain prior to the American Revolution upon exercise of its technical legal authority to raise general revenue out of the colonies. After all there is a great deal in a name. If a policy of waste is labelled conservation, the label may endow it with a long life in the face of common sense and in spite of all that we should have learned from attempts of the federal government to make a profit at the expense of the locality out of the public domain in the territories prior to the Civil War.

The matter is one of politics rather than of law, but it cannot be insisted upon too strongly that those who frame our legislation should understand the legal as well as the economic theory upon which they are proceeding, and those who are called upon to draft legislation in this connection will do well to read and ponder what Professor Swain has to say. R. P.

THE VALIDITY OF RATE REGULATIONS. By Robert P. Reeder. Philadelphia: T. & J. W. Johnson. 1914. pp. 440.

This is the kind of a book that makes a reviewer's task ungrateful. For an ungrateful task it is to be compelled to say that a great deal of effort, wide reading and considerable intellectual freedom from phrases, have, after all, been unproductive. Few subjects are more important, and surely none more interesting, than a consideration of "the principles of Constitutional Law, which are involved in rate regulation." From a book of four hundred pages, which aims at more than a digest's aloofness from contested issues, one cannot demand less than that it should help somewhat toward the solution of knotty problems — at least to the extent of a penetrating analysis of the issues. What is to be said then of a book on the Validity of Rate Regulation that leaves practically untouched, except for a conventional statement of the cases, the whole problem of compelling unremunerative services or the carriage of specific commodities at unremunerative rates? (See *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. Co.* v. *Conley*, 236 U. S. 605; 28 HARV. L. REV. 683.)

Instead of grappling with problems such as these, which are peculiarly within the jurisdiction of the author's subject, the bulk of the book — some hundred pages — is devoted to an attempt to demonstrate that the Supreme Court is wrong in extending the "due process" clauses to substantial rights instead of confining them to the safeguarding of orderly procedure. This is shooting at a target which is tempting to all constitutional marksmen, — but what 's the use? Holmes and Thayer and Pound and Corwin and Shattuck and the rest have again and again smoked out the enemy, or confined his operations, but he is as alive as von Hindenburg after a defeat. One does not detect even new kinds of weapon in the attack. Particularly immaterial to the main subject of the book is this predominant detour, inasmuch as, so far as questions affecting the validity of rate regulations go, Mr. Reeder, after disposing of questions by throwing "due process" out of the window, lets them walk in again